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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1987

JOHN YIAMOUYIANNIS, PH.D.,
Petitioner,
-VS-
CONSUMERS UNION OF THE UNITED STATES, INC.,
A NEW YORK CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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OPINIONS BELOW

The opinion of the United States District Court for Southern New York, per Owen, J., entered May 30, 1979, F. Supp. , is reprinted in the Appendix hereof. The opinion of the United States Court of Appeals for the Second Circuit, per Oakes, J., entered on March 19, 1980, F. 2d. , is reprinted in the Appendix hereof.

JURISDICTION

This Court has jurisdiction to entertain this Petition for Writ of Certiorari under 28 U.S.C., Section 1254(1). The time allowed for filing this Petition is 90 days from and after March 19, 1980 by virtue of 28 U.S.C., Section 2101(C), Cf. Rule 22 (3), Rules of the United States Supreme Court.

QUESTIONS PRESENTED

1. If, on motion for summary judgment in a federal diversity libel suit brought by a public figure plaintiff (Petitioner here), it appears on the one hand that the journalist claimed to have carefully assembled his facts and believed his defamatory assertions, and on the other hand that the sources the journalist claimed to have examined, as accentuated by proffered expert testimony, directly and objectively contradicted the allegations of the articles complained of, and the defendant (Respondent here) continued publication after the factual errors were pointed out, is there a triable issue of actual malice?

2. Is the correct legal standard for deciding the foregoing question set forth in the *Nader* v. *DeToledano,* 408 A. 2d 31 (D.C. App. 1979), cert. den. ____ U.S. ____ (1980)?

3. Did the United States Court of Appeals for the Second Circuit correctly apply the standard of *Nader* v. *DeToledano, supra,* in this particular case?

CONSTITUTIONAL PROVISIONS

The pertinent provisions of the United States Constitution are:

Amendment I, which reads in part, "Congress shall make no law . . . abridging the freedom of speech or of the press . . ."

Amendment VII, which reads, "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of the trial by jury shall be preserved, and no fact shall be otherwise reexamined in any court of the United States than according to the rules of the common law."

RULE PROVISION

Rule 56 of the Federal Rules of Civil Procedure pertains to summary judgment, and provides in part, "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law."

STATEMENT OF THE CASE

The references to the record hereinafter are to the record as organized for consideration by the United States Court of Appeals for the Second Circuit.

This is a federal diversity suit for libel. The Plaintiff (Petitioner here), Dr. John Yiamouyiannis, is a biochemist and epidemiologist with a worldwide reputation for his work tending to show a causal relationship between fluoridation and cancer. The Defendant (Respondent here), through Mr. Joseph Botta, a well-trained and experienced journalist, published two articles (Complaint Exhibits A-B, Appendix, pages 11-18) in the July and August, 1978, issues of *Consumer Reports* which has a circulation of about 2,000,000 copies throughout the country. Dr. Yiamouyiannis claims that these articles were defamatory of him, and sued for money damages.

While the Plaintiff (Petitioner here) requested jury trial as to disputed material facts (Complaint, page 9, Appendix, page 10), both sides moved for summary judgment.

From the motion papers, affidavits, and exhibits, it emerged that the articles in question made several comments of and concerning the Plaintiff (Petitioner here), the most prominent of which were to the effect that, either out of stupidity, malice, misguided sincerity, or greed, and using techniques of hysteria and propaganda, he contrived or contributed to a false con-

troversy concerning the safety of fluoridation, particularly in relation to the threat of cancer, and failed to adjust his crude data on cancer deaths for age, race, and sex as would any competent scientist working in the field. See Complaint Exhibits A and B, (Appendix, pages 11-18); and First Affidavit of Mr. Graham, pages 2-8, including references therein.[1]

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[1] On page 37 of his Affidavit in Support of Defendant's Motion for Summary Judgment, Mr. Joseph Botta, author of the articles here complained of (Complaint Exhibits A and B), candidly described the impression concerning the Plaintiff (Petitioner here), Dr. John Yiamouyiannis, and his colleague, Dr. Dean Burk, that he hoped his journalistic efforts would convey to the public. Specifically, his words were, ". . . the reader is left to draw his own conclusions as to whether the plaintiff and his cohort are motivated by stupidity, malice, misguided sincerity, or greed in their reckless and irresponsible actions . . . the plaintiff and his cohorts have continued irresponsibly to mislead the public about an issue vital to health, using techniques of hysteria and propaganda. . . ." Appendix, page 64.

On page 396 of Complaint Exhibit A, Mr. Botta wrote, "The real goal of antifluoridation groups, explains an American Dental Association official, 'is to create the illusion of a scientific controversy.'" Appendix, page 14. On page 482 of Complaint Exhibit B, Mr. Botta wrote, "The survival of this fake controversy represents, in CU's opinion, one of the major triumphs of quackery over science in this generation." Appendix, page 18.

On page 395 of Complaint Exhibit A, Mr. Botta wrote concerning the work of the Plaintiff (Petitioner here) and his colleague, "Drs. Burk and Yiamouyiannis had somehow managed to ignore the most fundamental factors involved in cancer mortality rates—age, sex, and race." Appendix, page 13. This latter sentence was intended to describe the work of Drs. Burk and Yiamouyiannis presented to a Subcommittee of the House Committee on Government Operations in the Congress of the United States on September 21, and October 12, 1977, the official transcript of which constitutes Defendant's Exhibit C. This is so, because on page 392 of Defendant's Exhibit A, Mr. Botta wrote, "Last fall, a subcommittee of the House's Committee on Government Operations held hearings on the issue. Drs. Burk and Yiamouyiannis testified . . . What emerged from the testimony in CU's opinion, was an unmistakable sense that millions of Americans are being grossly misled," etc. Appendix, page 11.

Whatever the ultimate truth may be, the reality of the fluoridation-cancer controversy among competent, learned, serious-minded scientists is beyond question. See Plaintiff's Exhibits 12, 13, and Defendant's Exhibit C; First Affidavit of Dr. Yiamouyiannis, pages 2-11 (Appendix, pages 69-78), including references therein; First Affidavit of Mr. Graham, pages 8-10, including references therein.[2]

Below the Defendant (Respondent here) argued that, despite the plain language of the articles in question here and the affidavit of the author the libels were not of and concerning the Plaintiff (Petitioner here). The explicit references set forth above are sufficient to demolish that contention. In any event, one can sue for defamation of another, if the author knew of the relationship between the person explicitly defamed and the complainant, and intended indirect reference to the latter. See, e.g., Vol. 35, *New York Jurisprudence,* Libel and Slander, Section 144; and Vol. 50, *American Jurisprudence 2nd.* Libel and Slander, Section 311.

Lest there be any question of the propriety of consideration of context, extrinsic circumstances, and innuendo, we refer the Court to the following New York cases: *Sanderson* v. *Caldwell,* 45 N.Y. 398 (1871); *O'Connell* v. *Press Pub. Co.,* 214 N. Y. 352, 108 N. E. 556 (1915); *Kloor* v. *New York Herald Co.,* 200 App. Div. 90, 192 N.Y.S. 465 (1922); and *Crane* v. *New York World Telegram Corp.,* 308 N.Y. 470, 126 N. E. 2d 753 (1955).

[2] At the conclusion of the congressional hearings to which earlier reference has been made (Defendant's Exhibit C, page 319), the chairman of the subcommittee, Hon. L. H. Fountain of North Carolina, remarked, ". . . the basic purpose of this hearing has been to bring this important matter into the open so that competent scientists can evaluate . . . I am not suggesting that flourides cause cancer. I do not know. Rather, I am saying that at the present time the carcinogenicity, or the lack of carcinogenicity, of this substance is a question which remains unanswered."

The excellent credentials of the Plaintiff (Petitioner here) Dr. Yiamouyiannis, as a biochemist, statistician, and epidemiologist, are described on pages 194-196 of Defendant's Exhibit C.

The seriousness of the controversy concerning the relationship between fluoridation and cancer is further manifest from a fair reading of Plaintiff's Exhibits Nos. 12 and 13: on November 16, 1978, in the case of *Aitkenhead* v. *West View,* No. GD 4585 78, tried before the

It is equally clear that the Plaintiff (Petitioner here) did adjust his crude data for age, race, and sex, and that he is a prominent, well-recognized scientist in the area of fluoridation. See Defendant's Exhibit C, pages 3-17, 18-40, 61-72, 191-196, 203-211, 310-319.[3] See also First Affidavit of Dr. Yiamouyiannis, pages 3, 7-8 (Appendix, pages 71, 75-76).

Allegheny County Court of Common Pleas in Pittsburgh, Hon. John P. Flaherty (now Associate Justice of the Pennsylvania Supreme Court) enjoined fluoridation as a nuisance on a finding that the measure causes cancer.

[3] In the passages of the congressional hearings cited above, Dr. Yiamouyiannis, in written submissions and oral testimony reprinted, showed adjustments for age, race, and sex, both by direct and indirect methods. Specifically, he demonstrated, in relation to crude data, that the ratio of males to females went down faster in the fluoridated cities, that therefore sex tends to widen the difference in cancer deaths between experimental and control cities, that race is a function of urbanization and only central cities were considered, that therefore race is not a factor, and that hard data breakdowns age group by age group show no discernable difference in cancer death rates among persons under 45 years of age, but considerable difference among persons 45 years of age and older, particularly among persons 65 years of age and older. Defendant's Exhibit C, pages 18-40. He went on to demonstrate that, if the indirect method of adjustment is used, including the so-called standardized mortality ratio, as preferred by his critics, his results by the direct method are confirmed. This is so, he explained, because his critics, aside from the deficiency of their method, made two primary errors: first, they mistabulated cancer deaths for nonfluoridated cities in 1970, and, secondly, they omitted 80-90% of the available and pertinent data in deriving their standardized mortality ratios; the correction of both errors, Dr. Yiamouyiannis made clear, yielded a confirmation of the results he and Dr. Burk reached by the method they preferred. All of the foregoing is made inescapably lucid in the transcript. Defendant's Exhibit C, pages 3-17, 61-72, 310-319. Not a single critic of the work of Drs. Burk and Yiamouyiannis testifying before the subcommittee claimed anywhere that they had not corrected for age, race, and sex. See pages 194-196 of Defendant's Exhibit C for a description of the qualifications and prominence in the field of fluoridation epidemiology enjoyed by the Plaintiff, Dr. Yiamouyiannis. It might be added that his colleague, Dr. Burk, is one of the most highly decorated cancer research scientists in the world, a veteran of fifty years of superb scientific work in the field. See page 471 of Defendant's Exhibit C.

The question formulated by the motions was simply whether the Defendant, (Respondent here) through Mr. Botta, published with actual malice.

Mr. Botta insisted that he carefully reviewed his sources, including the Hearings of the Fountain Subcommittee, conferred with a number of learned persons, and sincerely believed that his defamatory comments were true. See First Affidavit of Mr. Botta, pages 7-19 (Appendix, pages 36-48).

The Plaintiff (Petitioner here) showed, however, that the face of the Fountain Subcommittee Hearings, reviewed by Mr. Botta,[4] clearly reveal the seriousness and reality of the fluoridation-cancer controversy, as well as the extensive adjustments for age, race, and sex he executed; and thus, he claims, an inference of willful or reckless disregard for the truth is perfectly natural. See First Affidavits of Dr. Yiamouyiannis, pages 2-12 (Appendix, pages 69-79), and of Mr. Graham, pages 11-13, including references therein.

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[4] In his Affidavit in Support of Defendant's Motion for Summary Judgment, Mr. Botta explained that he had reviewed and carefully digested the transcript of the congressional hearings earlier mentioned. Indeed, he began his research by reading this piece, for, on page 7 of his Affidavit, Mr. Botta said, "During February of 1978, I began my investigation of the issue of fluoridation of public water supplies. I requested and received a copy of the transcript of the hearings before the House Subcommittee . . . A copy of the transcript is annexed to this affidavit as Exhibit C. . . ." Appendix, page 35. On page 8 of his Affidavit, Mr. Botta admitted that he read and digested Defendant's Exhibit C. Appendix, page 36. Cf. footnote 3 hereof.

As additional circumstantial evidence of actual malice, the Defendant (Respondent here) continued to license publication of the articles in question, even after the factual mistakes of Mr. Botta were clearly pointed out by the Plaintiff (Petitioner here). See Second Affidavit of Mr. Graham.[5] Cf. Affidavit of Dr. McKinney, and Plaintiff's Exhibit No. 2.[6]

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[5] Specifically, Consumers Union licensed publication of the articles here complained of in the *Journal of the California Dental Association*, Vol. 7, pages 41-49, published in January, 1979. Pages 10-11 of the First Affidavit of Mr. Graham reveals that Plaintiff's Exhibit No. 13 was made available to the Defendant (Respondent here) in the early autumn of 1978, prior to the commencement of this suit. This exhibit constitutes a summation of the evidence which "compellingly convinced" Justice Flaherty of the fluoridation-cancer link, in part by reason of the facts recited in footnote 3 hereof. See page 9 of Plaintiff's Exhibit No. 12. Cf. footnote 2 hereof. If the Defendant (Respondent here) had published in good faith at the outset, once they had learned the factual errors in their articles, they would have at least discontinued further publication and licensing for publication. Instead, they went ahead to broadcast their libels even further. What more convincing evidence of malice can be imagined?

[6] Dr. McKinney is a professor of scientific history at the University of Kansas with eminent knowledge in the field of fluoridation, a subject of considerable interest to him as a scholar. On page 1 of his Affidavit, Dr. McKinney expressed his expert opinion that "the said articles in *Consumer Reports* are full of elementary mistakes of science, gross misrepresentations of fact, deceitful omissions, and outrageous defamation, which no honest, careful journalist could possibly write." Plaintiff's Exhibit No. 2 is a letter to Dr. Yiamouyiannis from Mr. Patrick McGrady of New York City, a respected free-lance journalist. Mr. McGrady observed, "After reading the correspondence and the articles, I can only conclude that, in this case, CU and/or its writer didn't give a damn about searching out the truth. . . ."

The United States District Court for Southern New York held from the record as a matter of law that there was insufficient evidence of actual malice, and granted the Defendant (Respondent here) a summary judgment. The District Court apparently adopted the notion that the First Amendment exerts a special influence on Rule 56, F.R. Civ.P. in public figure libel actions, and held that in such cases summary judgment is the "rule" rather than the "exception." Given this premise, the District Court held that sharp disparity in fact between the source relied upon by the journalist, and the libel published, is insufficient evidence of actual malice to withstand summary judgment, at least where the journalist states by affidavit that he carefully reviewed his sources and consulted others. The Plaintiff (Petitioner here) appealed.

The United States Court of Appeals for the Second Circuit noted footnote 9 of the majority opinion in *Hutchinson* v. *Proxmire,* 61 L. Ed. 2d 411 at 422 (U.S. 1979), as well as the majority opinion in *Nader v. DeToledaro, supra,* and held, in light of the First and Seventh Amendments, that there is no special "rule" favoring preferred use of summary judgment in public figure libel actions, and that summary judgment operates the same way in such suits as in any other civil action. However, the Circuit Court, in applying this standard, held that there still was insufficient evidence of actual malice as a matter of law, because the journalist stated in an affidavit that he had consulted others, reviewed his source material, and protested his innocence of evil motive. The judgment of the District Court was therefore affirmed.

This Petition for Writ of Certiorari seeks review of the judgment of the Second Circuit.

ARGUMENT FOR WRIT OF CERTIORARI

1. We accept as settled principle that, in a public figure libel action, the plaintiff must prove actual malice — i.e. willful or reckless disregard of the truth — with convincing clarity. *New York Times* v. *Sullivan,* 376 U.S. 254 (1964). Nor do we doubt that the plaintiff in this case (Petitioner here) has voluntarily thrust himself into the forefront of the public controversy concerning fluoridation, so as to become a public figure.

The question we seek to have reviewed deals with the use of summary judgment in public figure libel actions.

2. The record below shows circumstantial evidence of actual malice, viz., sharp factual disparity between the source material relied on and the published libel, as well as tendered expert opinion, together with continued publication after the factual errors were shown to the publisher. This uncontradicted evidence was tendered in opposition to summary judgment.

In support of summary judgment, by way of an attempt to show the absence of actual malice, the journalist protested that he had studied the source material, consulted others, and acted with professional care. Although these assertions were not directly contradicted, they are insufficient to demonstrate the absence of malice as a matter of law in the context of a summary judgment motion. This is so, because, given this record, the credibility of these assertions is challenged by powerful circumstantial evidence, and may yet be further impeached, with possible aid of discovery by cross-examination at trial. Plainly, a reasonable jury can be persuaded by the circumstantial evidence, and might disbelieve the protestations of the journalist, after full development of the facts at trial.

Under normal procedure for summary judgment, guided by the traditional principles of jury trial mandated by the Seventh Amendment, a full hearing in open court, with direct and cross examination before a panel of jurors, would be required in this

case. It has been held that, if a journalist is shown to have been aware of the underlying facts which he reports inaccurately, a triable issue of actual malice has been created. *Wasserman* v. *Time, Inc.*, 424 F. 2d 920 (D.C. Cir. 1970). Likewise, it has been held, in a well-known copyright case, that so long as there is the slightest doubt as to state of mind, and credibility can be tested on cross examination, even if the testimony resisting summary judgment is out of the ordinary and hard to believe, it is error to grant summary judgment. *Arnstein* v. *Porter,* 154 F. 2d 464 (2 Cir. 1946).

3. It therefore appears to us that jury trial on the question of actual malice can be avoided, given this record, only by adoption of a special doctrine of summary judgment in public figure libel actions. Following the case of *New York Times* v. *Sullivan, supra,* inferior courts in this country began to develop a number of extrapolations from the seminal principle, one of which has been the idea that the First Amendment exerts a special influence on Rule 56, F.R. Civ. P., in other words, that the policy of press freedom is strong enough to warrant more liberal use of summary judgment for the protection of publishers sued for libel by public figures: otherwise, so this train of thought goes, press defendants would be chilled in First Amendment freedoms simply by the pendency of jury trial in public figure libel actions. The normal judicial rhetoric concerning summary judgment asserts that this procedure is appropriate only rarely, in the unusual or exceptional case, and that any doubt as to the existence of a question of fact should be resolved against use of summary judgment. But some courts, sensing the urgency of First Amendment demands, have insisted that summary judgment is the "rule" rather than the "exception" in public figure libel actions. See, e.g., *Oliver* v. *Village Voice, Inc.*, 417 F. Supp. 235 (S.D.N.Y. 1976); *Trentler* v. *Meredith Corp.*, 455 F. 2d 255 (8 Cir. 1972); and *Washington Post Co.* v. *Keogh,* 365 F. 2d 965 (D.C. Cir. 1966), cert. den. 385 U.S. 1011 (1967).

4. The problem we see with this approach is that the principles of summary judgment requiring extremely cautious use of this procedure are dictated by the Seventh Amendment. The right of jury trial in suits at common law is no less sacred to American legal institutions than press freedom, as may be seen, for example, in the Resolves of the First Continental Congress in 1774, (Tansill (ed.), *Documents Illustrative of the Formation of the Union of American States,* Gov't. Printing Office, 1927, p. 3), the Debates of the Philadelphia Convention on September 14, 1787 (Ibid, p. 716), and the 83rd and 84th Federalist (Madison, Hamilton & Jay, *The Federalist,* Mentor Ed., pp. 495-519), followed by prominent mention of both press freedom and jury trial in the same Federal Bill of Rights as framed in 1789 and adopted in 1791. The First Amendment should not be read to the detriment of the Seventh Amendment. Indeed, the use of summary judgment as normalized procedure in public figure libel actions effectively restricts litigous protest of harm to the reputations of those in the public forum whose offerings provoke the displeasure of the managers of big media: the effect can only be to intimidate participation in public debate of those persons — even those well known, but perhaps unpopular, figures — who do not have the support of major publishers. The notion of preferred use of summary judgment in public figure libel actions not only contravenes the Seventh Amendment, but practically limits freedom of speech and press for less powerful participants in the marketplace of ideas, contrary to the clear policy of the First Amendment.

5. In light of these considerations, we were gratified to see the dictum of Chief Justice Burger in footnote 9 of his majority opinion in *Hutchinson* v. *Proxmire, supra.* In that case, circumstantial evidence of actual malice consisted essentially of "unfair editing and summarizing" — in other words, sharp disparity between the source relied on and the writing complained of — precisely as we have here. The district court rejected this evidence of actual malice, and granted summary judgment on the special doctrine that summary judgment is the

"rule" rather than the "exception" in public figure libel actions. The Chief Justice responsively said in footnote 9:

> "Considering the nuances of the issues raised here, we are constrained to express some doubt about the so-called 'rule.' The proof of 'actual malice' calls a defendant's state of mind into question . . . and does not readily lend itself to summary disposition."

Interestingly enough, the Chief Justice made reference to *Herbert* v. *Lando,* 60 L. Ed. 2d 115 (U.S. 1979) in which Justice Byron White noted that circumstantial evidence is a normal way to prove actual malice in public figure libel actions. 60 L. Ed. 2d at 124.

In an apparent effort to conform to, or perhaps in anticipation of this message, the District of Columbia Court of Appeals voted against summary judgment in a case strikingly similar to this matter. In *Nader* v. *DeToledano, supra,* the essential facts developed on summary judgment motion were that a public figure, Mr. Ralph Nader, gave a congressional subcommittee certain information; that the subcommittee report found the claims of Mr. Nader to be erroneous, but to have been "made in good faith based on information available to him;" but that nevertheless the journalist, Mr. Ralph DeToledano, wrote in his column, "Nader falsified and distorted evidence to make his case." The appellate court, by vote of 2 to 1, reversed summary judgment in favor of Mr. DeToledano, and ordered jury trial. The disparity between the subcommittee report and the journalistic critique was considered enough evidence of actual malice to resist summary judgment. Said the majority, in language which we consider to be precisely appropriate:

> ". . . we are convinced that the special protection afforded press defendants in public figure libel actions does not necessitate a dilution of the Seventh Amendment by skewing the roles of judge and jury in summary judgment proceedings . . . we hold that the same principles applicable to

> normal summary judgment motions are applicable to such motions when made in a public figure libel action . . . The question to be resolved at summary judgment is whether plaintiff's proof is sufficient such that a reasonable jury could find malice with convincing clarity, and not whether the trial judge is convinced of the existence of actual malice."

We ask this Court to determine on writ of certiorari that the correct standard for summary judgment in public figure libel actions is that stated by the D.C. Court of Appeals in *Nader* v. *DeToledano, supra,* and expressed in footnote 9 of the opinion of the Chief Justice in *Hutchinson* v. *Proxmire, supra.*

6. In adopting the "footnote 9" approach in this case, the United States Court of Appeals for the Second Circuit noted,

> "Until more directly advised, we think that this neutral approach correctly states the rule as it is presently in force: neither grant nor denial of a motion for summary judgment is to be preferred. Defamation actions are, for procedural purposes, such as discovery . . ., or for summary judgment, to be treated no differently from other actions; any "chilling effect" caused by the defense of a lawsuit itself . . . is simply to be disregarded, to have no force and effect."

It is of importance that the country know whether the "footnote 9" approach is the law or not. It is noteworthy that so distinguished a court as the Second Circuit appears to be uncertain in some degree, but has merely made the assumption. Even in *Nader* v. *DeToledano, supra,* there was a vigorous dissent. There is considerable libel litigation in our state and federal courts. If this point is not settled with a clear statement from this Court, it takes no great amount of imagination to see that the resulting uncertainty could cause a serious split of authority, leading to contradictory decisions, hence a plethora of appellate litigation consuming vast amounts of time, money, and energy

of lawyers, litigants, and judges. We submit also that the wise statement of Lord Coke — "The known certainty of the law is the greatest security of us all" — particularly warrants review of this Court on writ of certiorari.

7. A troublesome feature of the opinion of the Second Circuit in this case is apparent confusion concerning the way the "footnote 9" approach should be applied. We believe that, if the dictum of the Chief Justice in *Hutchinson* v. *Proxmire, supra,* is the law, the denial of summary judgment would follow as a matter of course.

In *Nader* v. *DeToledano, supra,* the mere contradiction between the legislative report and the journalistic commentary was held to be sufficient evidence of actual malice to warrant jury trial. As footnotes 1-2 hereinabove demonstrate, we have precisely the same situation in this case: there is a sharp disparity between the remarks of the subcommittee chairman and the published libel. The same kind of disparity prompted the remarks of the Chief Justice in footnote 9 of *Hutchinson* v. *Proxmire, supra.*

Yet, in this case, the Second Circuit found insufficient evidence of actual malice as a matter of law, as if the "footnote 9" approach were accepted in name only, but in fact not at all. This result was prompted by Judge Oakes' conclusion of fact that the "unquestioned methodology of the preparation of the article exemplifies the highest order of journalism," etc. Appendix hereof, p. A-16. To reach this conclusion, Judge Oakes simply accepted at face value the affidavit of the journalist. At trial we would contest this defense claim by evidence of objective disparity between the admitted source of information and the published libel. And we would attempt to impeach the testimony of the journalist on cross-examination, with possible aid of discovery, and by the testimony of our witness — not only of the Plaintiff (Petitioner here), but of experts as set forth in footnote 6 hereinabove. Cf. *Arnstein* v. *Porter, supra.* These considerations, in our view, certainly warrant a jury trial in accordance with the Seventh Amendment.

Even assuming that the "footnote 9" approach is the law in certain enough degree, there is plainly confusion over how the principle should be applied to concrete facts. In short, the country needs unambiguous guidance and definition, lest the present misunderstandings continue. The facts of this case provide a very good illustration which this Court could use to teach.

For this additional reason, a writ of certiorari should go out.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
For The Second Circuit

No. 470—September Term, 1979
(Argued December 12, 1979 Decided March 19, 1980)
Docket No. 79-7541

John Yiamouyiannis,

Appellant,

-v.-

Consumers Union of the United States, Inc.,

Appellee,

Before:

Mulligan, Oakes and Gurfein,*

Circuit Judges

Appeal from a judgment of the United States District Court for the Southern District of New York, Richard Owen, *Judge,* granting summary judgment to a libel defendant, after cross-motions for summary judgment. Because the district court found correctly that appellant failed to make the requisite showing of "actual malice," the judgment is affirmed.

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* Judge Gurfein heard the argument on December 12, 1979, but died unexpectedly shortly thereafter. He expressed agreement with the result in this case, however.

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Michael N. Pollet, New York, N.Y. (Karpatkin, Pollet & LeMoult, New York, N.Y., Steven Delibert, of counsel), *for Appellee.*

Oakes, *Circuit Judge:*

This appeal in a diversity libel action is from a summary judgment for the defendant granted by the United States District Court for the Southern District of New York, Richard Owen, Judge. The plaintiff, John Yiamouyiannis, Ph.D., brought suit against Consumers Union of the United States, Inc. (Consumers Union) for libel said to have been contained in a two-part series of articles appearing in appellee's magazine, *Consumer Reports,* in July and August of 1978. The articles, entitled *Fluoridation: The Cancer Scare* and *The Attack on Fluoridation—Six Ways to Mislead the Public,* as their titles imply, attacked as misleading and erroneous the claims made by certain individuals and organizations that fluoridation causes cancer, birth defects and other ills. Appellant claims that he was defamed, particularly in the scientific community, but also in the eyes "of his fellow countrymen to whom he has something important to say" and "whom he serves and must convince." We affirm the judgment.

Briefly stated, the underlying facts are these: Dr. Yiamouyiannis is and for many years has been an active opponent of the fluoridation of public water supplies, and since 1974 has been a paid employee of the National Health Federation, which is an organization that for over twenty years has been actively opposed to fluoridation. Dr. Yiamouyiannis has also authored over fifteen articles on fluoride and is a coeditor of a

quarterly, *Fluoride,* published by the International Society for Fluoride Research. He appeared actively before the Subcommittee on Intergovernmental Relations and Human Resources of The House Committee on Governmental Operations on September 21 and October 12, 1977,[1] both to state his own views on the dangers of fluoridation and to refute the arguments of the National Cancer Institute (NCI) and various other organizations that have taken the position that fluoridation is not harmful and helps significantly in the prevention of dental caries. These other organizations include the National Academy of Sciences, the National Heart, Lung and Blood Institute, the American Medical Association, the American Cancer Society, and the American Dental Association.

The *Consumer Reports* article was written by Joseph R. Botta, a senior editor on the magazine staff. Botta is a professional journalist who has been a scientific writer for fifteen years, having worked for the Shell Oil Company from 1959 to 1971, and for Consumers Union in the environmental and health areas since 1972. Botta became interested in the topic of the campaign against fluoridation after having read an article in the *New England Journal of Medicine*—Walsh, *Fluoride, Slow Diffusion of a Proved Preventive Measure,* 296 New England J. Med. 1118 (1977)—and an article in a leading British medical journal—Doll & Kinlen, *Fluoridation of Water and Cancer Mortality in the USA,* Lancet, June 18, 1977, at 1300. But it was only when the House Subcommittee held hearings on the effects of fluoridation and its possible link to cancer that the decision to write and publish an article on the subject was made. Botta obtained a copy of the transcript of the hearings before the

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[1] *See The National Cancer Program (Part 2.—Fluoridation of Public Drinking Water); Hearings Before the Subcomm. on Intergovernmental Relations and Human Resources of the House Comm. on Governmental Operations,* 95th Cong., 1st Sess. (1977) (hereinafter "Hearings Record").

House Subcommittee and reviewed some standard medical reference works, which led him to the World Health Organization's 1970 report, *Fluorides and Human Health,* and to other studies on fluoridation. His conclusion from these studies, as stated in his affidavit, was that there was "*no* acceptable scientific evidence of any kind that the practice of fluoridating drinking water at approximate levels had any deleterious effects whatever" (emphasis in original).

In the course of Botta's research he also made reference to studies by the British Royal College of Physicians, by the Royal Statistical Society and by investigators at Oxford University. The Subcommittee hearings record contained a schedule, set out in the margin, of studies between 1954 and 1977 showing no association between cancer incidence or deaths and fluoride.[2] Accordingly, Botta was led by "the overwhelming weight of scientific evidence" to have serious doubts as to the credibility to be accorded to Dr. Yiamouyiannis's work—two unpublished versions of which, dating from July and December of 1975, were criticized by the National Cancer Institute. Hearings Record at 98-101, 110-113, 203-208. A more recent version of appellant's work, presented in England in May of 1977 and published in the magazine *Fluoride,* was incorporated in the hearings record. *Id.* at 18-40.

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[2]

Year and institution	Method	Association with fluoride
1954: Division of Dental Public Health (USPHS)	Cancer deaths in U.S. (N)	None
1962: Ministry of Health, Great Britain	Cancer deaths in English cities (N)	Do.
1974: Medical Research Council (G.B.), London School of Hygiene	Cancer deaths in English cities (N) (reanalysis of 1962 study)	Do.

A brief review of the *Consumer Reports* articles is as follows: The first article, published in July 1978, relates how Dr. Yiamouyiannis's colleague, Dean Burk, Ph.D., an American biochemist, helped to kill a proposal before the Dutch Parliament to fluoridate water supplies, by virtue of a television intereview in Holland in 1976 in which he told the audience that "fluoridation is a form of public mass murder." The article discusses the defeat in Los Angeles and hundreds of other American communities of fluoridation proposals, and mentions the House Subcommittee hearings. What emerged from the testimony, the article says, was "an unmistakable sense that millions of Americans are being grossly misled about fluoridation. The article then describes the initial investigation in the 1930s and 1940s resulting in the conclusion that fluoridation

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1975:	Oxford University (England)	Cancer incidence in English cities and rural areas (N)	Do.
	Do	Cancer incidence in cities and rural areas of New York, Connecticut, Holland, and New Zealand (A)	
1976:	National Cancer Institute (U.S.)	Cancer deaths in U.S. counties (N)	Do.
	Do	Cancer deaths in U.S. counties (A)	Do.
	Do	Cancer incidence in U.S. cities (A)	Do.
1977:	National Heart, Lung, and Blood Institute (U.S.)	Cancer deaths in U.S. cities (A)	Do.
1977:	Center for Disease Control (USPHS)	do	Do.
1976:	Royal College of Physicians (England)	Review (N & A)	Do.
1977:	National Academy of Sciences (U.S.)	do	Do.

Hearings Record at 101 ("Do." means "ditto").

helps prevent dental cavities, and also refers to the opposition that gradually developed. This opposition is now led by the National Health Federation, whose roots, the article says, "run deep into the soil of medical quackery."[3] The article goes on to say that in 1974, the NHF decided to "'break the back'" of fluoridation efforts and "hired Dr. Yiamouyiannis to do the job." It says that he was successful in influencing the debate in 1974 in Los Angeles, and that his July 1975 study with Dr. Burk (who is said to be a leading advocate of laetrile along with the NHF), "failed [according to the NCI] to take into account widely recognized risk factors known to affect the death rate." It adds that a later December 1975 study was even more "amateurish," according to an NCI official, and ignored "the most fundamental factors involved in cancer mortality rates—age, sex and race." The article reports that Drs. Burk and Yiamouyiannis were successful in Holland, but unsuccessful in England, and points out that "independent investigations by seven of the leading medical and scientific organizations in the English-speaking world have unanimously refuted the National Health Federation's cancer claims." *See* note 2 *supra.*

The second article, published one month later, refers to other claims that fluoridation causes harm, yet nowhere mentions Dr. Yiamouyiannis, Dr. Burk, or the National Health Federation in refuting theories that fluoride is a poison, causes birth defects, is mutagenic, causes allergic reactions, causes cancer in animals, and contributes to heart disease. However, the article does state

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[3] According to the article in 1963 the FDA released a report on the NHF that said in part:

> The stated purpose of the federation is to promote "freedom of choice" in health matters. This record shows that what this frequently means is freedom to promote medical nostrums and devices which violate the law. From its inception, the federation has been a front for promoters of unproved remedies, eccentric theories and quackery.

that "every type of misrepresentation known to Disraeli" has "been used to attack fluoridation," referring to the "misleading information" that appears regularly in a paper called the *National Fluoridation News,* and also states the the "entire gamut of hokum" has recently been published in an issue of the *Cancer Control Journal,* a pro-laetrile magazine based in Los Angeles. The article concludes by saying that the "simple truth is that there is no 'scientific controversy' over the safety of fluoridation," and that the "survival of this fake controversy represents, in CU's opinion, one of the major triumphs of quackery over science in our generation."

Appellant's unverified complaint in four counts, each seeking two million dollars in damages, complains of defamation mainly by innuendo. In essence, appellant reads the articles as saying that his work is "grossly and irresponsibly misleading" the American people; that fluoridation is absolutely and unquestionably safe; that appellant sold his scientific integrity and objectivity to contrive a deliberately false case against fluoridation; that appellant's work is incompetent "claptrap" and overlooks fundamental risk factors that elementary principles require; that appellant and Dr. Burk have insisted both in America and Europe that fluoridation is mass murder; and that they are men of no credibility or honor. All of this is said to be false and to have been published with the purpose of destroying the appellant's reputation with "willful or reckless disregard of the facts."

In moving for a summary judgment, appellee submitted Mr. Botta's affidavit as well as the House Subcommittee hearings. The affidavit set forth Botta's account of research, as above stated, which was undisputed, as well as his investigation of the background and qualifications of Drs. Yiamouyiannis and Burk and his consultants before publication, also undisputed. These consultations were with (1) the Consumers Union library staff, to determine the reliability of supporting references, (2) the technical department, (3) an in-house medical consultant, (4) an

outside medical advisor, (5) a dental consultant, (6) a Ph.D with experience in epidemiology and the safety of water supplies, (7) a psychiatrist who in connection with health fraud had investigated and written about the National Health Federation, (8) the head of the Environmental Studies Section of the Environmental Epidemiology Branch of NCI, and (9) a professor of biochemistry of the University of Minnesota, all of whom, after some suggested changes that were incorporated into the final version of the article, agreed that it was reliable and accurate.

Dr. Yiamouyiannis's counteraffidavit takes particular issue with the statement in the first article that he and Dr. Burk had ignored the most fundamental risk factors-age, sex and race—and says that this related only to their 1975 preliminary studies, whereas their later works did take into account.[4] The

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[4] The Hearings Record at 203-04 contains the following testimony, as to the later 1977 paper, from Dr. Robert N. Hoover, Head, Environmental Studies Section, Environmental Epidemiology Branch, Division of Cancer Cause and Prevention of the National Cancer Institute:

> Mr. Fountain. Dr. Newell, Mr. Goldhammer informs me that he asked NCI to review and to analyze a paper "Fluoridation and Cancer" written by Dr. Yiamouyiannis and Dr. Burk and published in the publication *Fluoride*. Has NCI done this?
>
> Dr. Newell. I will defer to Dr. Hoover.
>
> Dr. Hoover. Yes, I have, sir.
>
> Mr. Fountain. Would you give your expert assessment of the paper from your point of view?
>
> Dr. Hoover. The paper attempted to address some of the criticisms that have been directed at their earlier studies in that they had not controlled for age, sex and race, differences between the two areas.
>
> In the paper, they did not control for race and they did not think they had to. They attempted to control for age by using very broad age categories.

counter-affidavit also says that data and procedures of NCI were shown in Congress to be flawed by critical errors and omissions and that it was this data that was copied in England, thereby showing "the political intrigue of the current cover-up of the fluoridation cancer link."[3] He goes on to say that the

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So, in essence, they did not address the criticisms and they did not control for race, and they did not adequately control for age.

Therefore, I think the same criticisms that applied to the earlier works, such as inadequate control for differences between the two groups of cities, apply to their more recent effort.

In fact, even the crudeness of the analysis that they have done contributes to our opinion that there is, in fact, no association.

. . . .

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In general, there is a dictum in epidemiology. The crudest control is no control at all. That is using one age category. If you do a very crude control by splitting into several groups and you knock an association way down, it indicates to epidemiologists that maybe you need to achieve very fine control. That is, you need to take the controlling categories down to a finer level in order to see what happens to the association.

[3] The Hearings Record at 208 contains the following:

Dr. Hoover. Dr. Yiamouyiannis has demeaned some fairly renowned scientists in Great Britain by saying that they put their names on our publications. That is clearly not true. If you read their materials, you will see that it is not true. They used different standards than we did and they used truly elegant analyses which went much beyond what we did in our instant reanalysis. They did use the same set of data, however, and, therefore, they had the 1.5 percent error we did. We transmitted that information to them and then called them to see if correction of this error changed their conclusions.

seven independent investigations alluded to in the Botta article did not address the most recent and comprehensive study by Dr. Burk and the affiant appearing in *Fluoride* magazine, so that his work had not been "refuted."[6] Other issues with regard to the scientific viability of the fluoridation controversy are detailed.

Judge Owen below granted the motion for summary judgment, concluding that appellant had failed to meet his burden, under *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964), of establishing, "by clear and convincing evidence, at least a genuine issue of fact as to whether the articles were published with 'actual malice,'" *i.e.,* knowledge of falsity or reckless disregard of the truth. To make this showing, appellant relied mainly on the theory that the article was directly contradicted by one of the principal sources relied on by the publisher, the House Subcommittee report itself. But the judge held that no serious showing was made that either the author or the editor of the article "had the slightest doubt as to [the article's] truth and accuracy." Because of what it considered an absence of evidence of subjective awareness of probable falsity, *see Gertz*

I talked to Dr. Kinlen of Oxford on the phone, and I wish I could do the British accents for you, but Dr. Kinlen said, "Of course, it makes no difference at all."

Dr. D.J. Newell of the Royal Statistical Society said he had written me a letter but he did not call me because there was nothing urgent about it and the correction really made no difference in their conclusions either.

So, I think you can rest assured that the conclusions reached by Oxford and by the Royal Statistical Society are as they were published.

The error was not one of addition but of geography in that the NCI erroneously included all the deaths from Suffolk County (14,487) rather than the City of Boston (14,272). *Id.* at 81, 208. This made a difference of 1½-2% *Id.*

[6] *But see* notes 4 and 5 *supra.*

v. *Robert Welch, Inc.*, 418 U.S. 323, 334 n.6 (1974) (citing *St. Amant* v. *Thompson*, 390 U.S. 727, 731 (1968)), the court was compelled to award summary judgment.

Discussion

The rule of *New York Times Co.* v. *Sullivan, supra*, 376 U.S. at 279-80, is that, constitutionally, a public official cannot recover for a defamatory statement relating to his official conduct absent proof that the statement was made with "actual malice" as defined therein and subsequently in *St. Amant* v. *Thompson*, 390 U.S. 727, 731 (1968). This rule was expanded to cover "public figures," at least on matters of public interest, in *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130 (1967). In *Gertz* v. *Robert Welch, Inc., supra*, 418 U.S. at 344-48, however, the Court declined to accept what the late Harry Kalven referred to as the "invitation to follow a dialectic progression,"[7] and refused to extend *Sullivan* to private individuals. In holding that an attorney representing the family of the victim in a police shooting was not a public figure, the Court, after noting that public officials and public figures have greater access to the channels of effective communication than private individuals, added that most public figures have "voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them." *Id.* at 345. The Court described two ways in which people may be classified as "public figures":

> For the most part those who attain this status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public

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[7] Kalven, *The* New York Times *Case: A Note on "The Central Meaning of the First Amendment,"* 1964 Sup. Ct. Rev. 191, 221.

> controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment.

Id.[8]

On this basis, Mrs. Firestone, the plaintiff in a contested Palm Beach divorce case that had allegations on both sides of adultery and was a *cause celebre* in Palm Beach if not in all of Florida, was held not to be a public figure. *Time, Inc.* v. *Firestone,* 424 U.S. 448, 453-55 (1976). More recently, the Court held that a researcher of animal aggressive behavior, who had received federal funds for his research and received Senator Proxmire's "Golden Fleece Award," was not a public figure. *Hutchinson* v. *Proxmire,* 47 U.S.L.W. 4827, 4833-34 (U.S. June 26, 1979). This same is true of an individual who, in the late 1950s, was held guilty of contempt and given a suspended sentence with attendant publicity, for failure to appear before a grand jury investigating Soviet espionage. *Wolston* v. *Reader's Digest Association,* 47 U.S.L.W. 4840, 4841-42 (U.S. June 26, 1979). This person had in the interim returned to private life. In each case the *Gertz* formulation quoted above was relied upon for the result reached. *Firestone, supra,* 424 U.S. at 454-55; *Hutchinson, supra,* 47 U.S.L.W. at 4833; *Wolston, supra,* 47 U.S.L.W. at 4841-42.

Under that formulation, we have no doubt that appellant is a "public figure." While he is not one of those occupying a position of persuasive power and influence so as to be deemed a public figure for all purposes, he clearly is a person who has "thrust" himself "to the forefront" of a particular public controversy—that pertaining to fluoridation—"in order to influence the resolution of the issues involved," thereby in *Gertz's* words "invit[ing] attention and comment." 418 U.S. at 345.

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[8] *See* Note, *The Editorial Function and The* Gertz *Public Figure Standard,* 87 Yale, L.J. 1732, 1733 (1978) (describing two "branches" of *Gertz* rule).

Indeed, we do not understand appellant to dispute this; Judge Owen below stated that he was "an admitted public figure." And appellant's brief on appeal does not claim otherwise, though no express concession is made. But if there were any doubt about it, appellant's own complaint and affidavits would resolve it. His complaint notes that he is "Science Director of the National Health Federation, an organization *dedicated to the promotion* of health freedoms throughout the United States." Complaint ¶1 (emphasis supplied). It states that his work has been made "a matter of public record" in a "scientific paper," in the House Subcommittee Hearings, and in hearings before the Allegheny County Court of Common Pleas.[9] *Id.* ¶2. His affidavit states that he is a "recognized expert on the biological effects of fluoride," "has authored over fifteen articles on fluoride," and has "demonstrated to [Congressmen] that . . . the National Cancer Institute made . . . significant error(s)." Affidavit of Dr. Yiamouyiannis ¶¶ 1, 6. His statement pursuant to Local Rule 9(g) does not deny the following statements by appellee: that he "is and for many years has been an active and vociferous opponent of" fluoridation; that "since 1974, has been a paid employee of the National Health Federation, which has itself for over two decades been actively and vociferously opposed to fluoridation"; that he has produced studies obtaining broad distribution, including one in the City of Los Angeles, at a time when the voters of that city were to pass upon a water fluoridation referendum; that he has voluntarily sought and obtained the very widest publicity for himself and his views, in newspaper and magazine articles, radio and television broadcasts, public speeches, and other public forums; that he has testified at length as to his views, in various judicial

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[9] Exhibit 13, attached to appellant's affidavit, is a brief submitted to the Court of Common Pleas of Allegheny County, Pennsylvania in *Aitkenhead* v. *Borough of West View*, No. DG 4565-78, a case in which the court on the strength of the Burk-Yiamouyiannis study of 1977 preliminarily enjoined fluoridation under a permit granted by the state Department of Environmental Resources ten years before.

proceedings, and in the Subcommittee hearings; and that he has maintained for the past five years that the reason for his discharge as an employee of the Chemical Abstracts Service was his notoriety as an opponent of fluoridation.

In the light of the foregoing, appellant is clearly a public figure and the "actual malice" test of *Sullivan* therefore clearly applies.

Appellant's principal claim on appeal is that the district court erred in granting summary judgment because it thought, erroneously, that in libel cases summary judgment "'may well be the "rule" rather than the "exception."'" District Court Opinion at 2 (quoting *Oliver* v. *Village Voice, Inc.*, 417 F. Supp. 235, 237 (S.D.N.Y. 1976), which in turn quoted *Guitar* v. *Westinghouse Electric Corp.*, 396 F. Supp. 1042, 1053 (S.D.N.Y. 1975), *aff'd mem.*, 538 F.2d 309 (2d Cir. 1976)). While this view of the district court had considerable support in the case law at the time it was expressed, *e.g.*, *Trentler* v. *Meredith Corp.*, 455 F.2d 255, 257 n.1 (8th Cir. 1972); *Washington Post Co.* v. *Keogh*, 365 F.2d 965, 967-68 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 1011 (1967), footnotes in the recent *Hutchinson* and *Wolston* cases in the Supreme Court raise serious doubt as to the continued legal viability of the proposition, expressed in *Keogh*, that "[t]he threat of being put to the defense of a lawsuit . . . may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself." *Id.* at 968. Footnote 9 of the Chief Justice's opinion in *Hutchinson* not only states "doubt" about the supposed "rule" (supporting summary judgment), but takes almost the opposite position:

> Considering the nuances of the issues raised here, we are constrained to express some doubt about the so-called "rule." The proof of "actual malice" calls a defendant's state of mind into question, *New York Times* v. *Sullivan*, 376 U.S. 254 (1964), and does not readily lend itself to summary disposition. See 10 Wright & Miller, Federal Practice and Procedure § 2730, at 590-592. Cf. *Herbert* v.

> *Lando,* ____ U.S. ____ (1979). In the present posture of the case, however, the propriety of dealing with such complex issues by summary judgment is not before us.

47 U.S.L.W. at 4830 n.9. *Wolston* refers to this footnote, but again does not reach the question. 47 U.S.L.W. at 4831 n.3. And at least one appellate court has already said that "the same principles applicable to normal summary judgment motions are applicable to such motions when made in a public figure libel action." *Nader* v. *de Taledano,* 408 A.2d 31, 50 (D.C. 1979), *cert. denied,* 48 U.S.L.W. 3536 (U.S. Feb. 19, 1980).

Until more directly advised, we think that this neutral approach correctly states the rule as it is presently in force: neither grant nor denial of a motion for summary judgment is to be preferred. Defamation actions are, for procedural purposes, such as discovery, *see Herbert* v. *Lando,* 99 S. Ct. 1635 (1979), or for summary judgment, to be treated differently from other actions; any "chilling effect" caused by the defense of a lawsuit itself, *see Herbert* v. *Lando,* 568 F.2d 974, 980 (2d Cir. 1977) (Kaufman, C.J., for the court), *rev'd,* 99 S. Ct. 1635 (1979); *id.* at 993-94 (Oakes, J., concurring); *Washington Post Co.* v. *Keogh, supra,* 365 F.2d at 968, is simply to be disregarded, to have no force and effect. We must therefore now determine whether summary judgment was proper under this standard. Our job is made easier because both parties take the position that the evidence on actual malice has been fully marshalled. Since appellant does not seek or suggest the need of further discovery, the "state of mind" problem referred to in the Chief Justice's *Hutchinson* footnote is not present.

But this does not mean that our preliminary analysis is at end. The rule of *Sullivan,* in addition to requiring a defamation plaintiff to prove "actual malice" in the case of public officials and public figures, requires that proof of actual malice be with "convincing clarity," 376 U.S. at 285-86, a standard which is "intermediate between the normal 'preponderance of the evi-

dence' civil standard and the 'beyond the reasonable doubt' criminal standard," *Nadar* v. *de Toledano, supra,* 408 A.2d at 49. *See also Gertz* v. *Robert Welch, Inc., supra,* 418 U.S. at 342 (requiring "clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth"). Accepting this rule, there remains the question what standard the court should use in applying the law to the facts. In a case where the defendant has moved for summary judgment on the issue of actual malice and the plaintiff claims that there remain material factual disputes, the court decides the materiality of the disputed facts by accepting the plaintiff's version and applying the actual malice standard. This standard requires a clear and convincing showing, which may be by circumstantial evidence, of defendant's actual state of mind—either subjective awareness of probable falsity or actual intent to publish falsely. Therefore, a judge in denying a defendant's summary judgment motion must conclude that, based on the evidence asserted in the plaintiff's affidavits, "a reasonable jury *could find* malice with convincing clarity." *Nadar* v. *de Toledano, supra,* 408 A.2d at 49 (emphasis in original); *see Guam Federation of Teachers, Local 1581* v. *Ysrael,* 492 F.2d 438, 441 (9th Cir.), *cert. denied,* 419 U.S. 872 (1974). Under this standard we are convinced, as was Judge Owen below, that no reasonable jury could find with convincing clarity on the facts in this record that appellee, or its agents Botta and his editors and consultants, acted with actual malice in the *Sullivan-St. Amant* sense of that much-abused term.

It is clear that appellee, through its agents, made a thorough investigation of the facts. Scientific writings and authorities in the field were consulted; authoritative scientific bodies speaking for substantial segments of the medical and scientific community were investigated. The unquestioned methodology of the preparation of the article exemplifies the very highest order of responsible journalism: the entire article was checked and rechecked across a spectrum of knowledge and, where necessary, changes were made in the interests of accuracy.

Appellant's principal claim on appeal is that Botta's credibility is contested by circumstantial evidence. The House Subcommittee hearings, he argues, themselves show actual malice because they show (a) that "the reality of the fluoridation-cancer controversy among competent, learned, serious-minded scientists is beyond question," (b) that "Plaintiff did adjust his crude data for age, race, and sex," and (c) that he "is a prominent, well-recognized scientist in the area of fluoridation." Appellant also argues that, after publication of the articles but before suit and before a licensed republication in the *Journal of the California Dental Association* in January 1979, he made available to Consumers Union the 51-page memorandum submitted in the Allegheny County case, mentioned earlier, note 9 *supra*. This "rebroadcast" of the libels, he contends, shows malice.

Treating these points seriatim, even if in the opinion of some there is a real fluoridation-cancer controversy, this does not prove actual malice on the part of Consumers Union. Indeed, appellee's expressed "opinion" to the contrary, as such, is not defamatory at all, since false or even pernicious opinions are not actionable. *Gertz* v. *Robert Welch, Inc., supra,* 418 U.S. at 339-40; *Buckley* v. *Littell, supra,* 539 F.2d at 893-94. It is only through innuendo that anything defamatory can be read into the statement that there is no "scientific controversy," about fluoridation and cancer. We will accept for the purposes of this case appellant's argument that the statement contains an innuendo that appellant's studies and statements have been amateurish and not scientifically sound, are grossly misleading, and amount to "claptrap." This innuendo casts doubt upon appellant's scientific competence and, we will assume, might be thought to raise a triable issue of fact as to whether appellant was defamed. But the House Subcommittee hearings do not on their face demonstrate that appellee was acting with reckless disregard of the facts, much less with knowledge of falsity. Dr. Yiamouyiannis and his colleague Dr. Burk have certain qualifications (though the former's claim to being an epidemiologist

(Complaint ¶1) is not substantiated by the list of his qualifications set forth at pages 194-96 and 579 of the Hearings Record). But the hearings give clear support for the proposition in the article that "independent investigations by seven of the leading medical and scientific organizations in the English-speaking world have unanimously refuted the National Health Federation's cancer claims." *See* Hearings Record at 90-91, 100-01; note 2, *supra.* This evidence is sufficient to exonerate appellee on the issue of actual malice with respect to the general subject of appellant's professional competence. Even if, as appellant argues, these seven studies did not address appellant's later and more sophisticated July 1977 article, the hearings contain evidence that this study was seriously flawed as well. *See* note 4 *supra.*

More specifically, with respect to appellant's two 1975 studies, the article stated that the first failed to take into account "widely recognized risk factors"—ethnic, demographic and others[10]—and second was said to be "even more amateurish"—ignoring age, sex, and race.[11] Appellant's affidavit makes much of these remarks. But appellant does not deny that his 1975 articles did *not* take these risk factors into account—obviously there could be no actual malice if the statements were true. Moreover, his complaint that the *Consumer Reports* article did not address his subsequent 1977 article does not indicate either defamation or actual malice, especially since the later study was also suspect.[12]

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[10] This was substantiated by the Hearings Record at 110-11.

[11] This was substantiated by the Hearings Record at 111-13.

[12] The Hearings Record substantiates that it was. See note 4 *supra.* See also Hearings Record 218 (letter from D. J. Newell to Dr. J. Yiamouyiannis, Oct. 27, 1977).

In addition, the complaint argues that the Consumers Union article did not fairly show that the NCI had made a serious mathematical error, which, combined with a refusal to disclose certain procedures to appellant, amounted to a "cover-up of the fluoridation-cancer link." (Aff. of Dr. Yiamouyiannis ¶ 10). We find nothing, however, after perusal of the hearings record, that indicates that appellee's failure to discuss an NCI "cover-up" is defamatory of Dr. Yiamouyiannis, much less made with actual malice. The error was apparently minor,[13] and the failure to disclose was merely described in Botta's article as "less sinister than some members of the British Parliament were later led to believe"—a matter of opinion, fair for public comment.

Finally, we find nothing in the memorandum in the Allegheny County case, submitted to appellee after publication but before a republication, that is sufficient to show that appellee acted with actual malice. The argument in the memorandum itself is based principally on the studies of appellant and his NHF colleagues, and therefore is hardly sufficient to demonstrate that Botta or the others at Consumers Union who allowed the republication either knew that their criticisms of appellant were false, or were reckless concerning that question.

In short, with respect to any portions of the alleged defamatory matter that are not already protected as statements of opinion, no showing has been made that they were published with actual malice, let alone a showing that achieves "convincing clarity." The order granting summary judgment must therefore be affirmed.

Judgment affirmed.

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[13] See notes 5 and 12 *supra*.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
78 Civ. 4721

John Yiamouyiannis, Ph.D.,
Plaintiff,
-against-
Consumers Union of United States, Inc.,
Defendant.

MEMORANDUM AND ORDER

OWEN, District Judge

This libel action arises out of the public controversy concerning the safety of fluoridation of public water supplies, a measure that has been widely instituted in the belief it furthers dental health. Plaintiff, John Yiamouyiannis, is a prominent opponent of fluoridation, and has conducted and publicized studies purporting to establish a link between fluoridation and increased cancer death rates. He claims he was defamed in two articles appearing in the July and August 1978 editions of defendant's magazine, *Consumer Reports*. The articles defend fluoridation as a valuable dental health measure, and severely criticize as baseless and irresponsible the charges, by plaintiff and others, that fluoridation can cause dangerous side effects, such as cancer.

Both sides move for summary judgment. On these motions, the burden is squarely on plaintiff, an admitted public figure, to establish, by clear and convincing evidence, at least a genuine issue of fact as to whether the articles were published with "actual malice" within the meaning of *New York Times Co.* v.

Sullivan, 376 U.S. 254 (1964).[1] *Rinaldi* v. *Holt, Rirehardt & Winston, Inc.*, 42 N.Y.2d 369, 384-85. *cert. denied*, 434 U.S. 969 (1977); *Reliance Insurance Co.* v. *Barron's*, 442 F.Supp. 1341 (S.D.N.Y. 1977). While summary dismissal of actions at early stages in litigation is generally disfavored, see *Newman* v. *Commerce and Industry Insurance Co.*, 524 F.2d 1317 (2d Cir. 1975), in libel actions it "may well be the 'rule' rather than the 'exception.'" *Oliver* v. *Village Voice, Inc.*, 417 F.Supp. 235, 237 (S.D.N.Y. 1976), citing *Guitar* v. *Westinghouse Electric Corp.*, 396 F.Supp. 1042, 1953 (S.D.N.Y. 1975), *aff'd mem.*, 538 F.2d 309 (2d Cir. 1976). This policy in favor of affording summary relief to defendants in libel actions stems from a recognition of the need to avoid the "chilling effect" on free speech and press such suits pay have. See *Meeropel* v. *Mizer*, 381 F.Supp. 29, 32 (S.D.N.Y. 1974), *aff'd* 560 F.2d 1061, 1966 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978), and cases cited therein. It seems particularly appropriate to guard against any obstacle to the free flow of scientific debate where the truth or falsity of specific assertions may elude us for generations.

To publish a statement with "actual malice" is to publish "with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times* v. *Sullivan*, 376 U.S. at 280. It is established beyond dispute that actual malice may not be inferred merely from the false or defamatory content of the statement (*id.* at 272-73), nor from a lack of investigation before publishing, *St. Amant* v. *Thompson*, 390 U.S. 727, 731-32 (1968). Rather, "reckless disregard of the truth [means] subjective awareness of probable falsity; 'There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.'" *Gertz* v. *Welch*, 418 U.S. 323, 335 n.6, quoting *St. Amant* v. *Thompson*, 390 U.S. at 431 (1968).

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[1] Since the question of "actual malice" is determinative here, there is no need to consider the numerous other bases for summary judgment offered by defendant.

To establish actual malice, Mr. Yiamouyiannis relies on the following theory. By defendants own admission, the primary source of information for the *Consumer Reports* articles was the record of 1977 Congressional subcommittee hearings on the safety of fluoridation, at which Mr. Yiamouyiannis testified. (Defendant's Exhibit C). According to Mr. Yiamouyiannis, the subcommittee hearing record establishes conclusively that his research and studies showing a cancer-link in fluoridation have not been refuted by any reputable authorities. Therefore, the statements in the *Consumer Reports* articles pointing out serious flaws in Mr. Yiamouyiannis' studies and data could not have been published with any faith in their veracity. Specifically, Mr. Yiamouyiannis refers to statements in the July article that his studies have been refuted by the National Cancer Institute because they failed to account for the most fundamental factors involved in cancer mortality rates—age, sex, and race. He states that the Congressional record shows his studies did account for these factors. In essence, therefore, plaintiff claims that the patent falsity of the content of the articles, directly contradicted in the sources relied on by their publisher, is evidence of actual malice.

The foregoing allegations are, however, grossly inadequate to raise even an inference of actual malice, much less the clear and convincing proof necessary to survive a motion for summary judgment. There is overwhelming evidence in defendants affidavits, unrebutted by plaintiff, that the articles were prepared in an conscientious and professional manner after a thorough review of reputable sources and standard reference works on medicine and science. No serious question is raised that either the author or the editors who reviewed and approved the articles for publication had the slightest doubt as to their truth and accuracy.

Without contradicting any of these facts, plaintiff relies entirely on the claimed falsity of the statements to support his claim of actual malice. In light of the clear and weighty precedent rejecting such an approach, see *New York Times* v. *Sullivan,* 376 U.S. at 279-80, the suggestion is strong that plaintiff's object in bringing this action is to use this court to discourage the publication of opposing views. Needless to say, it is in the public interest for the debate on the safety of fluoridation to proceed in as free and open a manner as possible, without the threat of libel suits inhibiting the publication of conflicting studies and commentary.

In conclusion, since plaintiff has adduced no evidence to show actual malice on the part of defendants in publishing the two articles in question, summary judgment is granted to defendant and is denied as to plaintiff.

So Ordered.

May, 30, 1979.

Richard Owen
United States District Judge

Supreme Court, U. S.
FILED
JUL 21 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1987

JOHN YIAMOUYIANNIS, Ph.D.,

Petitioner,

—v.—

CONSUMERS UNION OF UNITED STATES, INC.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

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JOHN YIAMOUYIANNIS, Ph.D.,

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RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, Oakes, J., dated March 19, 1980, affirming the decision of the District Court, is not yet officially reported; it is set out at pp. A-1 to A-19 of the Appendix to the Petition for a Writ of Certiorari. The opinion of the United States District Court for the Southern District of New York, Owen, J., dated May 30, 1979, granting summary judgment to the defendant in that court, is also not yet officially reported, and appears at pp. A-20 to A-23 of the Appendix to the Petition.

QUESTION PRESENTED

Was the court below correct in affirming the grant of summary judgment in favor of a media defendant in a libel case, against a conceded public-figure plaintiff, where the record plainly demonstrated that plaintiff could make no showing whatever of constitutional "actual malice", and where the defendant's efforts to insure the accuracy of its article were so great as to move the Court of Appeals to characterize them as "the very highest order of responsible journalism"?

STATEMENT OF THE CASE

This is a diversity libel action, brought against Consumers Union of United States, Inc. (hereinafter, "respondent", "Consumers Union", or "CU"), the well-known not-for-profit independent testing organization, which for more than forty years has published the monthly magazine, CONSUMER REPORTS.[1]

The petitioner, John Yiamouyiannis, alleges that he was libelled in a two-part series of articles appearing in the July and August 1978 issues of CONSUMER REPORTS, entitled *Fluoridation: The Cancer Scare,* and *The Attack on Fluoridation—Six Ways to Mislead the Public.*

The facts underlying the case are carefully, succinctly, and accurately set forth in the opinion of the court below, as follows:

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1 At present, CU has approximately two hundred thousand individual members, and the magazine CONSUMER REPORTS enjoys a circulation of approximately 2.3 million. Over the years, CU has earned a widely respected and well-deserved reputation for accuracy and integrity, a fact which has been recognized by the courts. See *Consumers Union of United States, Inc. v. Theodore Hamm Brewing Co., Inc.*, 314 F.Supp. 697, at 698, 700 (D. Conn. 1970).

"Dr. Yiamouyiannis is and for many years has been an active opponent of the fluoridation of public water supplies, and since 1974 has been a paid employee of the National Health Federation, which is an organization that for over twenty years has been actively opposed to fluoridation. Dr. Yiamouyiannis has also authored over fifteen articles on fluoride and is a coeditor of a quarterly, *Fluoride,* published by the International Society for Fluoride Research. He appeared actively before the Subcommittee on Intergovernmental Relations and Human Resources of The House Committee on Governmental Operations on September 21 and October 12, 1977,[1] both to state his own views on the dangers of fluoridation and to refute the arguments of the National Cancer Institute (NCI) and various other organizations that have taken the position that fluoridation is not harmful and helps significantly in the prevention of dental caries. These other organizations include the National Academy of Sciences, the National Heart, Lung and Blood Institute, the American Medical Association, the American Cancer Society, and the American Dental Association.

"The *Consumer Reports* article was written by Joseph R. Botta, a senior editor on the magazine staff. Botta is a professional journalist who has been a scientific writer for fifteen years, having worked

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[1] *See The National Cancer Program (Part 2.—Fluoridation of Public Drinking Water): Hearings Before the Subcomm. on Intergovernmental Relations and Human Resources of the House Comm. on Governmental Operations*, 95th Cong., 1st Sess. (1977) (hereinafter "Hearings Record").

[Footnote by the court].

for the Shell Oil Company from 1959 to 1971, and for Consumers Union in the environmental and health areas since 1972. Botta became interested in the topic of the campaign against fluoridation after having read an article in the *New England Journal of Medicine*—Walsh, *Fluoride, Slow Diffusion of a Proved Preventive Measure,* 296 New England J. Med. 1118 (1977)—and an article in a leading British medical journal—Doll & Kinlen, *Fluoridation of Water and Cancer Mortality in the USA,* Lancet, June 18, 1977, at 1300. But it was only when the House Subcommittee held hearings on the effects of fluoridation and its possible link to cancer that the decision to write and publish an article on the subject was made. Botta obtained a copy of the transcript of the hearings before the House Subcommittee and reviewed some standard medical reference works, which led him to the World Health Organization's 1970 report, *Fluorides and Human Health,* and to other studies on fluoridation. His conclusion from these studies, as stated in his affidavit, was that there was '*no* acceptable scientific evidence of any kind that the practice of fluoridating drinking water at appropriate levels had any deleterious effects whatever' (emphasis in original).

"In the course of Botta's research he also made reference to studies by the British Royal College of Physicians, by the Royal Statistical Society and by investigators at Oxford University. The Subcommittee hearings record contained a schedule, set out in the margin, of studies between 1954 and 1977 showing no association between cancer incidence or

deaths and fluoride.[2] Accordingly, Botta was led by 'the overwhelming weight of scientific evidence' to have seriou doubts as to the credibility to be accorded to Dr. Yiamouyiannis's work—two unpublished versions of which, dating from July and December of 1975, were criticized by the National Cancer Institute. Hearings Record at 98-101, 110-113, 203-208. A more recent version of appellant's work, presented in England in May of 1977 and published in the magazine *Fluoride,* was incorporated in the hearings record. *Id.* at 18-40.

"A brief review of the *Consumer Reports* articles is as follows: The first article, published in July 1978, relates how Dr. Yiamouyiannis's colleague, Dean Burk, Ph.D., an American biochemist, helped to kill a proposal before the Dutch Parliament to fluoridate water supplies, by virtue of a television interview in Holland in 1976 in which he told the audience that 'fluoridation is a form of public mass murder.' The article discusses the defeat in Los Angeles and hundreds of other American communities of fluoridation proposals, and mentions the House Subcommittee hearings. What emerged from the testimony, the article says, was 'an unmistakable sense that millions of Americans are being grossly misled' about fluoridation. The article then describes the initial investigation in the 1930s and 1940s resulting in the conclusion that fluoridation helps prevent dental cavities, and also refers to the opposition that gradually developed. This opposi-

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[2] [The court's footnote 2, filling nearly a full page of the Appendix, sets out these studies in tabular form.]

tion is now led by the National Health Federation, whose roots, the article says, 'run deep into the soil of medical quackery.'[3] The article goes on to say that in 1974, the NHF decided to 'break the back' of fluoridation efforts and 'hired Dr. Yiamouyiannis to do the job.' It says that he was successful in influencing the debate in 1974 in Los Angeles, and that his July 1975 study with Dr. Burk (who is said to be a leading advocate of laetrile along with the NHF), 'failed [according to the NCI] to take into account widely recognized risk factors known to affect the death rate.' It adds that a later December 1975 study was even more 'amateurish,' according to an NCI official, and ignored 'the most fundamental factors involved in cancer mortality rates—age, sex and race.' The article reports that Drs. Burk and Yiamouyiannis were successful in Holland, but unsuccessful in England, and points out that 'independent investigations by seven of the leading medical and scientific organizations in the English-speaking world have unanimously refuted the National Health Federation's cancer claims.' *See* note 2 *supra.*

"The second article, published one month later, refers to other claims that fluoridation causes harm,

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[3] According to the article in 1963 the FDA released a report on the NHF that said in part:

> The stated purpose of the federation is to promote "freedom of choice" in health matters. This record shows that what this frequently means is freedom to promote medical nostrums and devices which violate the law. From its inception, the federation has been a front for promoters of unproved remedies, eccentric theories and quackery.

[Footnote by the court].

yet nowhere mentions Dr. Yiamouyiannis, Dr. Burk, or the National Health Federation in refuting theories that fluoride is a poison, causes birth defects, is mutagenic, causes allergic reactions, causes cancer in animals, and contributes to heart disease. However, the article does state that 'every type of misrepresentation known to Disraeli' has 'been used to attack fluoridation,' referring to the 'misleading information' that appears regularly in a paper called the *National Fluoridation News*, and also states that the 'entire gamut of hokum' has recently been published in an issue of the *Cancer Control Journal*, a pro-laetrile magazine based in Los Angeles. The article concludes by saying that the 'simple truth is that there is no "scientific controversy" over the safety of fluoridation,' and that the 'survival of this fake controversy represents, in CU's opinion, one of the major triumphs of quackery over science in our generation.'

"Appellant's unverified complaint in four counts, each seeking two million dollars in damages, complains of defamation mainly by innuendo. In essence, appellant reads the articles as saying that his work is 'grossly and irresponsibly misleading' the American people; that fluoridation is absolutely and unquestionably safe; that appellant sold his scientific integrity and objectivity to contrive a deliberately false case against fluoridation; that appellant's work is incompetent 'claptrap' and overlooks fundamental risk factors that elementary principles require; that appellant and Dr. Burk have insisted both in America and Europe that fluoridation is mass murder; and that they are men of no credibility or

honor. All of this is said to be false and to have been published with the purpose of destroying the appellant's reputation with 'willful or reckless disregard of the facts.'

"In moving for a summary judgment, appellee submitted Mr. Botta's affidavit as well as the House Subcommittee hearings. The affidavit set forth Botta's account of research, as above stated, which was undisputed, as well as his investigation of the background and qualifications of Drs. Yiamouyiannis and Burk and his [Botta's] consultants before publication, also undisputed. These consultations were with (1) the Consumers Union library staff, to determine the reliability of supporting references, (2) the technical department, (3) an in-house medical consultant, (4) an outside medical advisor, (5) a dental consultant, (6) a Ph.D. with experience in epidemiology and the safety of water supplies, (7) a psychiatrist who in connection with health fraud had investigated and written about the National Health Federation, (8) the head of the Environmental Studies Section of the Environmental Epidemiology Branch of NCI, and (9) a professor of biochemistry of the University of Minnesota, all of whom, after some suggested changes that were incorporated into the final version of the article, agreed that it was reliable and accurate.

"Dr. Yiamouyiannis's counter-affidavit takes particular issue with the statement in the first article that he and Dr. Burk had ignored the most fundamental risk factors—age, sex and race—and says that this related only to their 1975 preliminary studies, whereas their later works did take these into

account.[4] The counter-affidavit also says that data and procedures of NCI were shown in Congress to be flawed by critical errors and omissions and that it was this data that was copied in England, thereby showing 'the political intrigue of the current cover-up of the fluoridation cancer link.'[5] He goes on to say that the seven independent investigations alluded to in the Botta article did not address the most recent and comprehensive study by Dr. Burk and the affiant appearing in *Fluoride* magazine, so that his work had not been 'refuted.'[6] Other issues with regard to the scientific viability of the fluoridation controversy are detailed."

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[4] [The court's Footnote 4 contains a long excerpt from pp. 203-204 of the Hearings Record, setting forth testimony by the National Cancer Institute showing the failure of plaintiff's later works in fact to control properly for these demographic factors.]

[5] [Footnote 5 by the court sets forth testimony from p. 208 of the Hearings Record, showing the utter insignificance of the error involved.]

[6] *But see* notes 4 and 5 *supra*.

[Footnote by the court].

On these facts, the District Court found that there was insufficient evidence from which a jury could find "actual malice", even if the plaintiff could show falsity, and accordingly granted summary judgment; on appeal, the United States Court of Appeals for the Second Circuit affirmed.

The decisions below were eminently correct, and should not be disturbed by this Court. The petition should be denied.

REASONS WHY THE WRIT SHOULD BE DENIED

There can be no question that, on the record before them, the courts below were plainly correct in granting and affirming summary judgment in the respondent's favor. No more apt or appropriate case for summary judgment can be imagined, nor one less worthy of further waste of judicial time and effort.

1. The Courts Below Were Correct.

It is plain that the courts below were correct in granting and affirming summary judgment herein. The plaintiff concedes himself to be a public figure, as indeed he must. He has actively, voluntarily and aggressively thrust himself into the fluoridation issue, appearing before Congressional committees; seeking and obtaining extensive press and broadcast coverage; writing and speaking widely; and compiling what he asserts is a "national and international reputation" in the field. Accordingly, he falls squarely into that class of persons who "have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 345 (1974).

As a public figure, the plaintiff in order to prevail must show, not only the falsity of statements concerning him, but also that those false statements were made knowingly or with reckless disregard of the truth. *St. Amant v. Thompson,* 390 U.S. 727 (1968); *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964). On the record before the courts below, it was manifest that he could and would be able to make no such showing, and summary judgment was accordingly proper.

In support of its motion for summary judgment, Consumers Union made an overwhelming showing of the painstaking efforts it had made to insure accuracy in its article; the 37-page affidavit of Joseph R. Botta, particularly, detailed the sources (usually multiple) for every single statement of fact of which plaintiff complained, and the extensive and careful checking and rechecking of every aspect of the articles.

In response to this overwhelming showing, petitioner primarily argued below, as he does here, that "malice" could be inferred, because of the alleged great disparity between the articles, and the sources on which they relied, principally the House Subcommittee Hearing Record. His contention fails for two reasons, however: First, even if he were factually correct as to the alleged disparities, malice may not be inferred from falsity alone. *New York Times Co. v. Sullivan, supra,* 376 U.S. at 272-73. Second, as is apparent from the careful analysis by the Court of Appeals, the disparity which petitioner claims to see between articles and source, does not even exist; there is abundant evidence in the hearing record to support respondent's stated opinion and conclusion that Dr. Yiamouyiannis' work, if not knowingly false, was bungled, incompetent, and amateurish. (See, e.g., A-16–A-18.)

Except for these baseless assertions, plaintiff presented below and presents here nothing which even tangentially suggests that he can show falsity, much less malice, or that summary judgment should have been denied. Petitioner claims (Petition, p. 8, n.5) that malice may be inferred, from respondent's continued licensing of republication of the articles, after respondent had been supplied with a copy of a brief prepared by plaintiff's

counsel in an anti-fluoridation case in Allegheny County, Pennsylvania. As the court below correctly observed, however (A-19), that brief itself relies upon petitioner's own discredited work, and thus can hardly have convinced respondent of the falsity of its criticisms of that work; moreover, the material in question was only supplied to Consumers Union after publication of the original articles, and thus can hardly show anything about CU's state of mind when publishing them. (The petitioner does not base any separate cause of action on the republication.)

The petitioner also claims that he is entitled to a trial, because he would there "attempt to impeach the testimony of the journalist on cross-examination, with possible aid of discovery, and by testimony of our witness [sic]—not only of the Plaintiff . . . but of experts as set forth in footnote 6 hereinabove." (Petition, p. 15)

None of this, plainly, is or should be sufficient to avert summary judgment, in a libel case or any other kind of case. The plaintiff cannot now invoke the "possible aid of discovery", for, as the court below noted (A-15), the petitioner has already waived it, suggesting in neither the District Court nor the Court of Appeals that he needed any such procedures in order to prove his case.

Nor has the plaintiff suggested any possible testimony by himself or his "experts", sufficient to avert summary judgment. Both his own affidavit, and those of his so-called "experts", Mr. McGrady and Dr. McKinney, were before the courts below, and none contained any evidence of substance in opposition to summary judgment; indeed, the conclusory accusations of the

latter two affidavits (see Petition, p. 8, n.6) hardly rise above the level of simple name-calling, and contain nothing even admissible in evidence. If it is plaintiff's contention, of course, that these "experts" would have had something else to say, the place to show that would have been in the District Court; it is elementary that "[a] party opposing a motion for summary judgment simply cannot make a secret of his evidence until the trial, for in doing so he risks the possibility that there will be no trial." *Donnelly v. Guion*, 467 F.2d 290, 293 (2d Cir. 1972).

Petitioner, then, is left only with the vain hope that he might, at trial, succeed in impeaching or discrediting CU's author, Mr. Botta. Plainly, under long-established precedent, this is not enough.

> "If the most that can be hoped for is the discrediting of defendant's denials at trial, no question of material fact is present. [Citations omitted]. Even if we were to disregard the denials as incredible, plaintiffs would still be required to come forward with evidence which, viewed most favorably to them, would permit an inference of conspiracy. Absent such evidence, there is no issue for trial. 'Summary judgment cannot be defeated by the vague hope that something may turn up at trial.' *Perma Research & Development Co. v. Singer Co.*, 410 F.2d 572, 578 (2d Cir. 1969)." *Modern Home Institute, Inc. v. Hartford Accident & Indemnity Co.*, 513 F.2d 102 (2d Cir. 1975).[2]

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2 Petitioner's contrary argument, relying on *Arnstein v. Porter*, 154 F.2d 464 (2d Cir. 1946), is wildly misplaced, for the very court which decided *Arnstein* has since squarely held that "The rule of *Arnstein* . . . is no longer good law," *Beal v. Lindsay*, 468 F.2d 287, 291 (2d

As there was substantial—not to say overwhelming—evidence of the care and conscience with which CU prepared its articles, and there was not an iota of evidence presented by plaintiff, even to suggest falsity, much less malice, the courts below were plainly correct in their grant and affirmance of summary judgment in favor of the defendant.

2. The Importance of This Case Does Not Merit Granting the Writ.

Petitioner appears to argue that the writ should be granted either because the court below misperceived the significance of footnote 9 to Mr. Chief Justice Burger's opinion for the Court in *Hutchinson v. Proxmire*, 443 U.S. 111, 120 (1979), which questioned the "rule" in favor of summary judgment in libel cases, which other courts had been developing; or because some sort of guidance is needed by the lower courts as to the applicability of the *Hutchinson* footnote.

Both arguments are totally misplaced, for it is plain from its opinion that the court below relied on no special "rule", and none is necessary, in affirming the grant of summary judgment herein. All that the court below held in this case, was that upon the application of ordinary summary judgment principles, surely no *less* applicable in defamation cases than in any other, the defendant should prevail—that where the plaintiff is able to present *no* evidence from which a jury could find in favor of the plaintiff, on the central elements of his case, the

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Cir. 1972), ". . . leaving cases like *Arnstein* as mere mementos of law gone by as far as the burden of proof on a motion for summary judgment." 6A MOORE, FEDERAL PRACTICE, ¶ 56.17 [13], at p.56-798 (footnotes omitted).

defendant is entitled to judgment.[3] ". . . [W]e are convinced, as was Judge Owen below, that no reasonable jury could find with convincing clarity on the facts in this record that appellee, or its agents Botta and his editors and consultants, acted with actual malice in the *Sullivan-St. Amant* sense of that much-abused term." (A-16)

For these very reasons, even if the petitioner is correct that the lower courts need "guidance" in the application of *Hutchinson*, this case would be a singularly inappropriate vehicle by which to render such "guidance", unless the meaning of *Hutchinson* is that *no* defamation case, no matter how frivolous, is to be disposed of by summary judgment. Any possible further discussion by this Court of the propriety of summary judgment in a closer case—such as one where the plaintiff has made a strong showing of falsity, or of facts or circumstances known to the defendant which cast doubt on his story, or of sloppy or careless investigation—could only be *dictum* in this case, where the plaintiff has made no such showing. Accordingly, what petitioner in fact seeks from this Court is no more nor less than an advisory opinion, an exercise in which the federal courts do not deign to indulge. *Hall v. Beals*, 396 U.S. 45 (1969).

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3 For the same reason, petitioner is wholly mistaken in his effort to imply the existence of a conflict where none exists, between the decision of the court below, and that of the District of Columbia Court of Appeals in *Nader v. deToledano*, 408 A.2d 31 (Ct.App.D.C. 1979), cert. denied ____ U.S. ____ (1980).

3. This Court Should Not Encourage Petitioner's Abuse of the Courts by Granting the Writ.

Throughout plaintiff's papers in this case, from the complaint itself on to the present, there have appeared repeated indications that plaintiff's true motive in bringing this action, is not the desire to obtain redress for any real or imagined harm to his reputation. It has been apparent throughout, that the real flaw in plaintiff's claim, has been his attempted distortion into a libel claim, of his disagreement with Consumers Union over the alleged dangers of fluoridation, in order to obtain a forum to trumpet his views, and to use the courts to punish Consumers Union for having the temerity to disagree with his position, and the temerity to accept instead the considered findings of every respected authority which has ever investigated the safety of fluoridation.

Indeed, the District Court found clearly that ". . . the suggestion is strong that plaintiff's object in bringing this action is to use this court to discourage the publication of opposing views." (A-23)

In such circumstances, it is clear, the granting of a writ of certiorari in this case would have unfortunate consequences, far beyond the significance of the case itself. The very granting of the writ would serve as encouragement to the plaintiff and the growing number of others like him, who seek to abuse and misuse the courts for all manner of improper purposes, of punishing those with whom they disagree, and obtaining a forum for their views.

Such improper activities should not be encouraged by granting the writ.

CONCLUSION

For all of the reasons set forth herein, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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